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Supreme Court, U.S.
FILED
NOV 28 1994
OFFICE OF THE CLERK

No. 94-689

In The

Supreme Court of the United States

October Term, 1994

Duncan Energy Company, NBB Oil & Gas Partners (U.S.A.), Amerada Hess Corporation, Tyrex Oil Company and Turtle Mountain Gas & Oil, Inc.,

Petitioners,

v.

The Three Affiliated Tribes of the Fort Berthold Reservation; Three Affiliated Tribes Tribal Business Council; Three Affiliated Tribes Tax Commission; Wilbur D. Wilkinson, Chairman, Tribal Business Council; Joseph J. Walker, Tax Commissioner; and Marcus Wells, Jr., Director Tribal Employment Rights Office,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICI CURIAE STATES OF NORTH DAKOTA, ALABAMA, ARIZONA, COLORADO, FLORIDA, MONTANA, NEVADA, SOUTH DAKOTA, UTAH AND WYOMING IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The amici curiae states, through their respective Attorneys General, respectfully submit this brief pursuant to S. Ct. R. 37 in support of the petition for writ of certiorari.

INTEREST OF THE AMICI STATES

The federal judiciary has long had primary responsibility for resolving disputes over state and tribal regulatory authority in Indian country. Most of these disputes have involved the scope of state jurisdiction, but more recently the Court has been asked to determine the reach of tribal regulatory power. "In all of these cases, the governing rule of decision has been provided by federal law." *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852 (1985). The first question presented here is whether, when tribal power is contested, the exercise of federal jurisdiction should be conditioned on the challenger's first invoking and exhausting tribal administrative and judicial remedies. The second question is whether such tribal power exists.

The amici states have two substantial interests in how these questions are answered. The first is practical. Jurisdictional controversies between tribes and states are common. Many are resolved without litigation, but access to federal court for timely injunctive or declaratory relief can be critical. Although the exhaustion requirement adopted by the Court of Appeals presumably will have no effect on a tribe's access to federal court to vindicate inherent regulatory authority, it can serve to deny states or other nontribal entities a ready federal forum to

resolve disputes over tribal regulatory authority. It is a suspect rule which accords one group of litigants the right to immediate federal relief for the purpose of establishing a power but denies another group such right for the purpose of contesting that power. The second issue is critical to the amici since the existence of inherent tribal regulatory power not only can effect the scope of state authority (*e.g., Rice v. Rehner*, 463 U.S. 713, 723-24 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980)) but also can influence whether and to what extent concurrent regulatory power is used (*cf. Northern Border Pipeline Co. v. Montana*, 772 P.2d 829, 837-38 (1989) (Weber, J., concurring)).

Beyond these practical concerns, however, lie notions of federalism. The Court of Appeals extrapolated from *National Farmers Union* and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), the conclusion that any dispute with a tribe or tribal member over "reservation affairs" is subject to exhaustion. That reading distorts the reasoning of those decisions and creates an anomalous exception to the "virtually unflagging obligation [of federal courts] . . . to exercise the jurisdiction given them." *Colorado River Water Conservation District, et al. v. United States*, 424 U.S. 800, 817 (1976). In the context of federal-state relations, principles of federalism or judicial efficiency have counseled abstaining from or deferring the exercise of § 1331 jurisdiction in certain instances, yet even those principles have never cut so deeply into that exercise as the exhaustion doctrine espoused below. The amici are troubled that "an Indian tribe's [administrative law and] judicial system is entitled to a greater degree of

deference than the [administrative law and] judicial system of a sovereign State." *Iowa Mutual*, 480 U.S. at 22 (Stevens, J., concurring & dissenting).

SUMMARY OF THE ARGUMENT

The Court has considered and resolved questions of the inherent civil regulatory power of Indian tribes over the on-reservation conduct of nonmembers without requiring exhaustion of tribal adjudicatory remedies. *South Dakota v. Bourland*, 113 S. Ct. 2309 (1993); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Montana v. United States*, 450 U.S. 544 (1981). Its decision in *National Farmers Union* did not mark a watershed break in this practice. Instead, it established only a requirement that, when a tribe's civil adjudicatory power in an *ongoing* tribal court proceeding is challenged, the exercise of jurisdiction under 28 U.S.C. § 1331 must await conclusion of its resolution by the tribal court.

The Court of Appeals' decision expands the *National Farmers Union* exhaustion doctrine to encompass any claim questioning the existence of a tribe's civil regulatory authority over nonmember conduct or lands because such claim is deemed to implicate "reservation affairs." It also expands the doctrine as it was applied in *Iowa Mutual*. There, the Court deferred exercise of jurisdiction over an insurance contract-interpretation claim integrally related to causes of action filed against Iowa Mutual, the

federal court plaintiff, in a preexisting tribal court proceeding. *Iowa Mutual*, like *National Farmers Union*, represents a limited incursion into the ordinary duty of federal courts to exercise congressionally conferred jurisdiction, not a wholesale repudiation of that duty.

Not only is there no Indian law decision from this Court justifying the Court of Appeals' decision, but it also finds no analogue in *Younger v. Harris*, 401 U.S. 37 (1971), *Colorado River Water Conservation District, et al. v. United States*, 424 U.S. 800 (1976), or their progeny. These decisions seek, as a general matter, to avoid federal court interference with or duplication of state judicial proceedings. Whatever their precise scope, they do not provide an analytical basis for exhaustion where only a federal law-based claim is involved and no tribal administrative or judicial proceedings have been commenced.

The Court has stressed repeatedly the federal judiciary's "virtually unflagging obligation" to exercise its jurisdiction. *Colorado River*, 424 U.S. at 817. Federal courts have no dispensation from this general rule merely because a claim challenges a tribe's civil regulatory authority over nonmembers. Unimpeded access to a federal forum is instead particularly essential in such cases because federal courts often provide the only forum in whose impartiality tribes and nonmembers alike have confidence. The Petition thus presents an important question over the scope of the *National Farmers Union* exhaustion doctrine – a question which should be decided now.

Equally important is the second question presented in the Petition: whether tribal regulatory jurisdiction

exists over the Petitioners' oil and gas extraction activities pursuant to leases with nonmember property owners in a defined area of the Fort Berthold Reservation where 98% of the land is held in fee by nonmembers. *Montana* established a presumption against such jurisdiction subject arguably to two exceptions, and that presumption has been more recently applied in *Brendale* and *Bourland*. Nevertheless, the divided nature of the opinions in *Brendale*, together with ambiguity in *Bourland* concerning the source of the *Montana* exceptions, promise to create, and indeed have created, confusion in lower courts concerning the second exception. Because the scope of inherent tribal jurisdiction over nonmembers is far too sensitive a matter to be left to confusion, the Court instead should clarify the controlling principles.

ARGUMENT

I. *NATIONAL FARMERS UNION* ESTABLISHED A NARROW EXCEPTION TO THE ORDINARY OBLIGATION OF FEDERAL COURTS TO EXERCISE JURISDICTION UNDER 28 U.S.C. § 1331 WHEN PROPERLY INVOKED. THE COURT OF APPEALS' DECISION FAILS TO RECOGNIZE THE LIMITED NATURE OF THAT EXCEPTION AND OTHERWISE CONFLICTS WITH ANALOGOUS DECISIONS.

A.

National Farmers Union was the Court's first case in which the issue of tribal civil adjudicatory jurisdiction over nonconsenting nonmembers was raised. Two questions were presented in *National Farmers Union*: whether

jurisdiction under 28 U.S.C. § 1331 existed with respect to a claim by an insurance company and its insured, a state school district, that a tribal court lacked subject matter jurisdiction to enter and enforce a judgment against the district in an ongoing personal injury action, and, if § 1331 jurisdiction did exist, whether tribal adjudicatory jurisdiction was present. The Court held that "[t]he question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331." *Id.* at 852. Nonetheless, it further held that the exercise of § 1331 jurisdiction should be stayed to "provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge" and that only after the plaintiffs' exhaustion of "the remedies available to them in the Tribal Court system" should a federal court address the merits of their challenge. *Id.* at 856, 857. The exhaustion requirement announced in *National Farmers Union* therefore derived directly from a determination that it would be inappropriate to interfere with enforcement of a tribal court judgment, and the associated proceedings to determine its validity, until such tribal court had been given an opportunity to consider the jurisdictional challenge.

Nothing in *National Farmers Union* suggests it was intended to usher in a new era of federal courts' deferring to tribal administrative and judicial processes all challenges to a tribe's regulatory jurisdiction, even when there exist no tribal proceedings in which the federal court plaintiff is a party or in privity with a party. The subsequent decision in *Iowa Mutual* similarly was not a

marked change in the exercise of federal jurisdiction. *Iowa Mutual* differed from *National Farmers Union* because it involved not a challenge to tribal court jurisdiction but a federal diversity action commenced by an insurance carrier to litigate an issue related to liability asserted against it in an ongoing tribal court proceeding. The Court concluded that deferring exercise of federal jurisdiction was appropriate because, "[a]s *National Farmers Union* indicates, proper respect for tribal legal institutions requires that they be given a 'full opportunity' to consider the issues before them and 'to rectify any errors.' " *Id.* at 17. Although *Iowa Mutual* was distinguishable from *National Farmers Union* in important respects (*id.* at 20 (Stevens, J., concurring & dissenting)), it nevertheless was aimed specifically at protecting the integrity of tribal court proceedings initiated before the federal action.

B.

The Court of Appeals, in its reversal of the District Court, broadened the reach of the *National Farmers Union* exhaustion doctrine to encompass jurisdictional challenges unrelated to an ongoing tribal adjudicatory proceeding. The court ruled that because the Petitioners' challenged the Three Affiliated Tribes' inherent authority to enforce its employment and taxation laws against nonmembers on fee lands, it is "a dispute arising on the Reservation" which triggers the exhaustion requirement. Pet. at 12a; *Duncan Energy Co., et al. v. Three Affiliated Tribes, et al.*, 27 F.3d 1294, 1300 (8th Cir. 1994). That the Petitioners did not challenge the jurisdiction of any tribal adjudicatory entity in an ongoing proceeding was deemed immaterial. Every challenge to tribal jurisdiction

must, according to the lower court, be examined "in the first instance by the tribal court itself." Pet. at 12a; 27 F.3d at 1299. It approved of language describing this rule as " 'inflexible' " and " 'mandatory.' " Pet. at 12a; 27 F.3d at 1300.

The Court of Appeals viewed its decision as so squarely falling within the scope of the *National Farmers Union* exhaustion doctrine as not to require careful consideration of the "virtually unflagging obligation [of federal courts] . . . to exercise the jurisdiction given them." *Colorado River*, 424 U.S. at 817. *National Farmers Union* nonetheless does not stand for the proposition that, merely because a federal court plaintiff challenges a tribe's regulatory jurisdiction, exhaustion of tribal administrative and judicial remedies must occur absent any exception to the exhaustion requirement. *See National Farmers Union*, 471 U.S. at 856 n.21. Accepting such a broad reading of *National Farmers Union* effectively would foreclose immediate federal court access in a class of cases to which § 1331 jurisdiction indisputably exists and over which federal courts routinely have exercised such jurisdiction. *E.g. South Dakota v. Bourland*, 113 S. Ct. 2309 (1993); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Montana v. United States*, 450 U.S. 544 (1981).

Here, the principal justification for application of the *National Farmers Union* exhaustion rule is vindication of tribal self-government and self-determination interests. Pet. at 10a-11a; 27 F.3d at 1299. To use those interests as the basis for broadening the exhaustion doctrine, however, loses sight of the notion that in *National Farmers*

Union "the policy of supporting tribal self-government and self-determination" was defined only as "favor[ing] a rule that would provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." 471 U.S. at 856. The self-government interest at stake in *National Farmers Union* was the tribal court's right to complete its adjudication before review of its jurisdictional determination by a federal court. It is one thing to say that, once sued in tribal court, a litigant ordinarily must complete that adjudicatory process before seeking to void the tribal court's actions on jurisdictional grounds, but it is quite another to require a litigant to invoke a tribe's regulatory or adjudicatory jurisdiction for the purpose of arguing that such jurisdiction does not exist. The latter proposition makes no sense and, unsurprisingly, finds no support in a fair reading of *National Farmers Union* or *Iowa Mutual.*

The Court of Appeals' two other justifications for exhaustion – judicial efficiency and " 'encourag[ing] tribal courts to explain to the parties the precise basis for accepting jurisdiction,' " Pet. at 10a; 27 F.3d at 1300 – do not apply when no tribal adjudicatory proceedings are ongoing and only federal law questions are presented. Deferring exercise of § 1331 jurisdiction under those circumstances promotes delay, not efficiency, since initiation of a separate administrative or judicial proceeding in a different forum is necessary. Procedural difficulties are unlikely to occur in a single, federal action. Where a tribal court has not exercised jurisdiction, the third justification similarly has no role. The "benefits of tribal explanations and expertise," *Burlington Northern Railroad Co. v. Crow Tribe*, 940 F.2d 1239, 1246 (9th Cir. 1991), can be realized

through the Tribes' participation in the federal proceeding.

The Court of Appeals' expansion of the exhaustion requirement not only outstrips the analytical reach of *National Farmers Union* but also finds no counterpart in other decisional authority concerned with the appropriate exercise of federal jurisdiction. The most closely analogous of such authority is that alluded to in *National Farmers Union* – abstention in accord with principles derived from *Younger v. Harris*, 401 U.S. 37 (1971) – and In *Iowa Mutual* – deferral in accord with principles derived from *Colorado River. National Farmers Union*, 471 U.S. at 856 n.21; *Iowa Mutual*, 480 U.S. at 16 n.8.

With respect to *Younger*, the Court has said:

> Under *Younger*-abstention doctrine, interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests. . . . *Younger* abstention is required, however, only when state court proceedings are initiated 'before any proceedings of substance on the merits have taken place in the federal court.' . . . in other cases, federal courts must normally fulfill their duty to adjudicate federal questions properly brought before them.

Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 237-38 (1984); *accord Ankenbrandt v. Richards*, 112 S. Ct. 2206, 2216 (1992) ("Though we have extended *Younger* abstention to the civil context, . . . we have never applied the notions of comity so critical to *Younger's* 'Our Federalism' when no

state proceeding was pending nor any assertion of important state interests made"); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13-14 (1987) ("Both *Juidice [v. Vail*, 430 U.S. 327 (1977)] and this case involve challenges to the processes by which the state compels compliance with the judgments of its courts. Not only would federal injunctions in such cases interfere with the execution of state judgments, but they would do so on grounds that challenge the very process by which those judgments were obtained. So long as those challenges relate to pending state proceedings, proper respect for the ability of state courts to resolve federal questions presented in state court litigation mandates that the federal court stay its hand"); *see generally* Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 349 (2d ed. 1990) ("Perhaps the strongest of the four reasons for *Younger* deference is the desire to avoid interference with the state judicial process. . . . [T]he state retains an inherent interest in not having its judicial process grind to a halt while the federal courts decide constitutional questions").

Colorado River deferral is directed at promoting judicial efficiency, not as in *Younger* at furthering federalism, and has a tightly restricted range. "[T]he circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention." *Colorado River*, 424 U.S. at 818. In contrast to the Court of Appeals' decision, which predicates deferral simply on the ground that the Tribes' regulatory jurisdiction has been challenged, *Colorado River* requires the existence of

"exceptional" circumstances, *id.*, before "the contemporaneous exercise of concurrent jurisdictions," *id.* at 817, will be deemed inimical to judicial administration interests. That such exceptional circumstances do not exist here, where federal law governs resolution of the Petitioners' claims, is underscored by the Court's analysis in *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 25-26 (1983), in which *Colorado River* deferral was denied:

> [W]e emphasize that our task in cases such as this is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist "exceptional" circumstances, the "clearest of justifications," that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction. Although in some rare circumstances the presence of state-law issues may weigh in favor of that surrender, . . . the presence of federal-law issues must always be a major consideration weighing against surrender.

Even if *Iowa Mutual* set a lower threshold for deferral in determining the merits of a nonfederal law dispute when concurrent federal and tribal court proceedings exist, nothing in that opinion indicates deferral is required when only federal law issues are presented and concurrent proceedings do not exist. *See Iowa Mutual*, 480 U.S. at 21-22 (Stevens, J., concurring & dissenting). Indeed, the lack of concurrent proceedings vitiates the very rationale for *Colorado River* deferral: wise judicial administration.

The importance of clarifying the scope of the *National Farmers Union* exhaustion requirement is clear. The Court

of Appeals' decision represents an abdication by the federal judiciary of its central role in deciding difficult questions of governmental authority on Indian reservations. The amici states regularly are confronted with the task of reconciling competing jurisdictional claims on reservations. This task not only is legally complex but also presents substantial social and political difficulties. Tribes and their members often assert that state forums are insensitive to their interests, and nontribal members voice comparable concerns about tribal forums. Federal courts accordingly remain in many instances the only forum with the perceived ability to impartially resolve jurisdictional questions. In addition, the Court of Appeals' decision conflicts with the obligation of federal courts to exercise their jurisdiction when properly called upon by litigants to do so. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 358-59 (1989); *see also McCarthy v. Madigan*, 112 S. Ct. 1081, 1087 (1992); *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988). The sensitive nature of the federal issues involved here and the disregard of the Petitioners' appropriate invocation of § 1331 jurisdiction warrant review of the first question.

II. WHETHER TRIBAL REGULATORY JURISDICTION EXISTS OVER THE PETITIONERS IS APPROPRIATE FOR RESOLUTION AND PRESENTS SQUARELY THE SCOPE OF THE SECOND *MONTANA* EXCEPTION.

The Petitioners' oil and gas drilling activities occur on nonmember lands within an area of the Fort Berthold Reservation opened for homesteading under the Act of June 1, 1910, 36 Stat. 455, and the Act of August 3, 1914,

38 Stat. 681. This area is known as the "Northeast Quadrant." Pet. 27a. The quadrant contains over 360,000 acres, 97.7% owned in fee by nonmembers. *Id.* 27a-28a. The tribal regulation at issue – two taxation ordinances and one employment preference ordinance – apply to the Petitioners simply because they engage in such activities on the reservation and without reference to whether those activities involve a consensual relationship with the Tribes or occur on tribal lands. In fact, the Petitioners' activities are conducted exclusively on nonmember lands under leases executed with those lands' owners. *Id.* 28a. The Court of Appeals reversed the District Court's determination that the Tribes lack regulatory jurisdiction, concluding that the lower court had "erred by failing to analyze the applicability of the *Montana* exceptions and by finding this exercise of regulatory authority to be impermissible as a matter of law." Pet. 9a; 27 F.3d at 1299.

In *Montana v. United States*, 450 U.S. 544, 565 (1981), the Court noted "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." However, it then observed:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands

> within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 565-66 (citations omitted). The Court of Appeals' decision raises an important question concerning the existence of tribal regulatory jurisdiction over the Petitioners under the second exception.[1]

The answer to that question must be informed by the Court's decisions in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), and *South Dakota v. Bourland*, 113 S. Ct. 2309 (1993). In *Brendale*, which involved application of tribal zoning regulations, four members of the Court reasoned that the second *Montana* exception "should . . . not be understood to vest zoning authority in the tribe when [nonmember] fee land is used in certain ways" because "[t]he governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land." 492 U.S. at 430 (White, J.). Instead, a tribe may have a federally "protectible interest . . . defined in terms of the impact of the challenged uses on the political integrity, economic security, or the health or welfare of the tribe," *id.* at 430-31, which can be vindicated through participation in state administrative proceedings or, if necessary, through federal court relief

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[1] Although the Court of Appeals reversed the District Court for not applying either exception, the first clearly has no application. The regulated activity of the Petitioners involves contracts with nonmembers, and there is no suggestion in the District Court's findings of any consensual relationship with the Tribes or their members.

against any "demonstrably serious" impact of the nonmember activity deemed to "imperil" the protectible interest. *Id.* at 431.

Two other members of the Court applied a different standard, that is, whether the tribe retains the power to exclude nonmembers from the area sought to be regulated. *Id.* at 444-45 (Stevens, J.) Those Justices found no such authority in one case when approximately one-half of the land in the affected area was owned in fee by nonmembers but found regulatory power as to a nonmember parcel situated in an area composed almost exclusively of tribal lands and into which the tribe controlled access. *Id.* at 438-39, 444; *see also id.* at 447 ("[I]t is unlikely that Congress intended to give the Tribe the power to determine the character of an area that is predominately owned and populated by nonmembers, who represent 80 percent of the population yet lack a voice in tribal governance").

Bourland involved the exercise of tribal authority over nonmember hunting and fishing on lands taken by the federal government for flood control purposes. The Court reiterated that, under *Montana* and *Brendale*, "when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former [treaty-based] right of absolute and exclusive use and occupation of the conveyed lands" and that "[t]he abrogation of this greater right, at least in the context of the type of [open, nonpristine] area at issue in this case, implies the loss of regulatory jurisdiction over the use of the land by others." 113 S. Ct. at 2316; *accord id.* at 2317 ("an abrogated treaty right of unimpeded use and occupation of lands 'can no longer serve as the basis for tribal exercise

of the lesser included power' to regulate"); *id.* at 2318 ("regardless of whether land is conveyed pursuant to an Act of Congress for homesteading or for flood control purposes, when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control").

In light of congressional action "clearly abrogat[ing] the Tribe's pre-existing regulatory control over non-Indian hunting and fishing," the Court further rejected the contention that the tribe retained inherent authority to regulate. *Id.* at 2319-20; *see also id.* at 2320 n.15. Notwithstanding the latter conclusion, the Court then stated that "[t]he question remains . . . whether the Tribe may invoke other potential sources of tribal jurisdiction over non-Indians on these lands" and remanded for determination of the applicability, if any, of the *Montana* exceptions. *Id.* at 2320.

The analysis in *Bourland* warrants clarification. As *Montana* indicates, the exceptions to the "general proposition" that tribes lack regulatory jurisdiction over nonmembers are grounded in the residue of inherent sovereign power. It is thus problematic to characterize those exceptions, and the authority the Court of Appeals deemed may flow from them, as arising from "other potential sources of tribal jurisdiction." Put simply, eliminating inherent tribal sovereignty as a source of regulatory power logically should obviate the need to consider whether the second *Montana* exception applies.

The Court, finally, should determine definitively whether the second exception has vitality and, if so, the

standards to be used in resolving its applicability. The plurality opinion in *Brendale* held that, in a zoning context, the second exception will never form a predicate for the exercise of tribal regulatory jurisdiction and, under land ownership and demographic characteristics less skewed to nonmember dominance than those here, two other Justices concurred in the plurality's result with respect to the "open" area. It is accordingly unremarkable that the District Court found no reason to apply the second exception.[2]

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[2] In this regard, the factual showing made by the Tribes concerning the second exception's alleged applicability is telling. Its affidavits contended in general terms that the Petitioners' oil and gas extraction activities had adverse environmental effects on the Reservation and tribal members. *Duncan Energy Co. v. Three Affiliated Tribes*, No. 93-3622 (8th Cir.), Applts.' App. at Tabs O, P, S. Even if one leaves aside the question whether the conclusory allegations in the affidavits satisfied the "demonstably serious" and "imperil" requirements imposed under the *Brendale* plurality opinion, two facts stand out. First, none of the asserted harm from the petitioners activity is regulated or mitigated by the taxation and employment preference ordinances at issue, i.e., the Petitioners can continue their oil and gas extraction, regardless of its harmful effects, as long as they pay tribal taxes and observe the obligations imposed under the tribal employment relations ordinance. Second, the alleged harm – off-fee land effects of on-fee land conduct – appears qualitatively no different from that which the *Brendale* plurality concluded should be ameliorated through nontribal administrative or judicial remedies. Any suggestion that the petitioners' activities contribute to unemployment on the reservation and therefore have an effect on the Tribes seems farfetched, since presumably the amount of unemployment would be no less were the petitioners to cease their extraction work.

Jurisdictional disputes of the type presented here are becoming increasingly common, and only this Court can provide the guidance essential to resolving them efficiently and consistently. Indeed, the need for guidance is perhaps reflected best in the Court of Appeals' recent remand decision in *Bourland* itself. *South Dakota v. Bourland*, Nos. 90-5486 & 90-5515, 1994 WL 605890 (8th Cir. Nov. 7, 1994). There, a majority of a three-judge panel held that the tribe had failed to justify application of the second *Montana* exception but declined to "consider [or] decide whether Justice White's *Brendale* opinion modified the second *Montana* exception for cases such as that presented here." *Id.* at *n.4. The dissenting judge believed the second exception applied because, in his view, the terms "threatens" and "has some direct effect" in the second exception's formulation should be read disjunctively and any nonmember conduct with a non-de minimis effect on tribal interests is sufficient to justify exercise of tribal regulatory power. *See id.* at *3 ("The district court erred in applying the higher standard articulated in the *Brendale* plurality opinion. The second *Montana* exception clearly covers conduct that threatens *or* has a direct effect on the Tribe. I see nothing in the Supreme Court's *Bourland* decision, which remanded this case, to indicate that *Brendale* altered the inquiry under *Montana*"). The time has come to address this significant issue.

CONCLUSION

The amici states respectfully request that the petition for writ of certiorari be granted.

Respectfully submitted,

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November 1994